Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

HELEN CUMMINGS,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

According to the relevant statute, a claimant who is seeking veterans' benefits from the government and whose claim is denied by the Board of Veterans' Appeals must be given notice of the procedure for obtaining review of the denial. The question presented is whether that notice is inadequate when it fails to inform a claimant of certain time limits relating to her right to appellate review; fails to inform her that she may be entitled to pro bono representation before the court; and fails to inform her that she may be entitled to have the government pay her attorney fees.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is at 136 F.3d 1468 (Fed.Cir. 1998) and is reprinted in the Appendix ("App.") at App. 1. The order of the Court of Veterans Appeals dismissing the case for lack of jurisdiction is an unpublished disposition, No. 95-1058 (Vet. App. June 26, 1996) and is reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on February 24, 1998.

PROVISIONS INVOLVED

28 U.S.C. § 2412. Costs and fees.

. . . .

> (d)(1)(A) Except as otherwise provided by statute, a court shall award to a prevailing party other than United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings

> for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

38 U.S.C. § 1310. Deaths entitling survivors to dependency and indemnity compensation.

> (a) When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents. The standards and criteria for determining whether or not a disability is service-connected shall be those applicable under chapter 11 of this title.
>
> . . . .

38 U.S.C. § 5104. Decisions and notices of decisions.

> (a) In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision.
>
> . . . .

38 U.S.C. § 7263. Representation of parties; fee agreements.

> (a) The Secretary shall be represented before the Court [of Veterans Appeals] by the General Counsel of the Department.

38 U.S.C. § 7292. Review by the United States Court of Appeals for the Federal Circuit.

> (a) After a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision.
>
> . . . .
>
> (c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional provisions, to the extent presented and necessary to a decision.

42 U.S.C. § 406. Representation of claimants before Commissioner [of Social Security].

> (a) Recognition of representatives; fees for representation before Commissioner.
>
> > (1) The Commissioner of Social Security may prescribe rules and regulations governing recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being

> recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security.

20 C.F.R. § 404.1700. Introduction.

> You may appoint someone to represent you in any of your dealings with [the Social Security Administration].

38 C.F.R. § 3.103(a). Procedural due process and appellate rights. Statement of policy.

> . . . Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

STATEMENT OF THE CASE

The surviving spouse of a deceased veteran whose death was related to service is entitled to benefits from the government. 38 U.S.C. § 1310 (1998); *see generally* 38 U.S.C. §§ 1301 *et seq.* A surviving spouse seeking such benefits must file an original claim with a Department of Veterans Affairs ("VA") Regional Office. If the Regional Office denies her claim, she may appeal to the Board of Veterans' Appeals ("BVA"), which is a branch of the VA. Like Regional Office proceedings, BVA proceedings are informal and ex parte in nature. In fact, until 1988, BVA decisions were not subject to judicial review.

However, in 1988, Congress created the United States Court of Veterans Appeals ("CVA"), an Article I court with jurisdiction limited to appeals of veterans' benefits claims. *See* Veterans' Judicial Review Act of 1988 ("VJRA"), Pub. L. No. 100-687, *reprinted in* 1988 U.S.C.C.A.N. 5795. The CVA is independent of the Department of Veterans Affairs. The United States Court of Appeals for the Federal Circuit has direct and exclusive appellate jurisdiction to review the CVA's conclusions of law, including its interpretations of regulations or statutes. *See* 38 U.S.C. § 7292.

Helen Cummings is the surviving spouse of Charles T. Cummings, who served in the military on active duty from July 1940 to August 1945. Mr. Cummings died in March 1992, and Mrs. Cummings subsequently applied to the VA for the benefits due a surviving spouse of a deceased veteran whose death was related to service. The regional office denied her claim, finding that there was no connection between her husband's death and his time in

service. Mrs. Cummings appealed to the BVA, and in a decision dated February 28, 1995, the BVA denied her claim.

According to the statutory scheme, when the Secretary of Veterans Affairs ("Secretary") issues notice of a decision, "[t]he notice shall include an explanation of the procedure for obtaining review of the decision." 38 U.S.C. § 5104(a). In an attempt to satisfy this statute, a notice of appellate rights accompanied the February 28, 1995, notice of denial. *See* Appendix 3. The notice of appellate rights stated in pertinent part:

> (1) You may file a motion for reconsideration of this BVA decision. . . .
>
> (2) You may have the right to appeal this decision to the United States Court of Veterans Appeals (the Court). . . . A Notice of Appeal must be filed with the Court within 120 days from the date of mailing of the notice of the BVA decision. . . . You may obtain information about the form of the Notice of Appeal, the methods by which you may file your Notice of Appeal with the Court, the amount of any filing fee, and other matters covered by the Court's rules directly from the Court. . . .
>
> An accredited representative of a recognized service organization, or an individual whom you choose to represent you in your claim before VA and on appeal to the BVA, may represent you without charge. An attorney-at-law or an accredited agent may also represent you. An attorney or accredited agent may charge you a fee to represent you before VA, including the BVA, with respect to a claim under the following circumstances: . . . You may ask the Court to

> give you information on representation before the Court.

Mrs. Cummings chose to move for reconsideration. Her motion was received at the BVA 127 days after the February 28 decision. The Board denied her motion for reconsideration on August 2, 1995. In the notice of appellate rights that accompanied the August 2, 1995, denial letter, the Board explained that

> [i]f you filed your motion for reconsideration within 120 days of the date of mailing of the Board's decision, you now have an additional 120 days from the date of mailing of the letter denying your motion for reconsideration, which accompanies this notice, within which to file a Notice of Appeal with the Court. *Rosler v. Derwinski*, 1 Vet.App. 241 (1991).

On October 24, 1995, Mrs. Cummings filed a Notice of Appeal at the U.S. Court of Veterans Appeals. She argued, inter alia, that the February 1995 notice of appellate rights from the BVA did not meet the requirements of § 5104(a), and that thus the period for filing a timely Notice of Appeal was tolled.

The Court dismissed the appeal for lack of jurisdiction, since neither Mrs. Cummings' motion for reconsideration nor her Notice of Appeal was filed within 120 days of the initial BVA decision. In its order, the Court found that the BVA had satisfied the requirement of § 5104(a) by providing "a general outline of what steps must be taken in order to appeal the BVA decision" to the Court of Veterans Appeals. *Cummings v. Brown*, No. 95-1058, slip op. at 2 (Vet.App. June 26, 1996), *quoting*

Pittman v. Brown, 9 Vet.App. 60, 65 (1996). Mrs. Cummings appealed this dismissal to the Federal Circuit, which found that the notice of appellate rights met the requirements of § 5104(a).

REASONS FOR GRANTING THE WRIT

The notice of appellate rights which the Secretary provided to Mrs. Cummings is the same notice of appellate rights provided all veterans who receive adverse decisions from the BVA. Because this notice is insufficiently detailed, it impedes the right of veterans to judicial review. To provide some indication of the magnitude of this problem, a total of 15,872 adverse BVA decisions were issued in fiscal year 1997. Report [to Congress] of the Chairman, Board of Veterans' Appeals, Fiscal Year 1997, at 23.

The statutory scheme mandates that "[t]he notice [of a decision of the Secretary] shall include an explanation of the procedure for obtaining review of the decision." 38 U.S.C. § 5104(a). The notice of appellate rights provided by the Secretary with BVA denials is insufficient under § 5104(a) because it does not explain the *Rosler* tolling principle; does not advise a claimant that she may hire an attorney to represent her at the Court of Veterans Appeals at no charge to her; and does not advise her that if she does pay for the services of an attorney to represent her at the Court of Veterans Appeals, the VA will pay her attorney fees if the conditions specified in the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1994 & Supp. III 1997) are met.

First, the notice of appellate rights provided after an initial BVA decision makes no mention of the fact that the timing of a request for reconsideration is intertwined with eligibility for judicial review. Specifically, as explained by the CVA decision in *Rosler v. Derwinski, supra,* the filing of a request for reconsideration tolls the time to file a notice of appeal. Thus, if the claimant files her request for reconsideration within 120 days of the BVA decision, she has 120 days *from the denial of reconsideration* to file her notice of appeal to the CVA.

The Court of Veterans Appeals based its *Rosler* decision on this Court's holding in *ICC v. Brotherhood of Locomotive Engineers,* 482 U.S. 270 (1987), that a timely petition for administrative reconsideration tolls the period for judicial review of the original administrative order. *Rosler* at 244. The CVA also found that statutes require that "when [the BVA] denies a motion for reconsideration [it must] advise the claimant of the new 120-day judicial appeal period that commences, as to the underlying substantive BVA decision, on the date of the mailing of the BVA's notice of denial of the motion for reconsideration." *Rosler* at 249. Obviously, then the CVA considered the *Rosler* tolling principle an important piece of information for claimants to have; otherwise, it would not have required it on the notice of appellate rights that accompanies the denial of a request for reconsideration. But the CVA did not go far enough: claimants should have this information before, not after, they file a request for reconsideration.

In the case at bar, Mrs. Cummings filed her request for reconsideration 127 days after the BVA's initial denial, a mere week too late to preserve her right for judicial

review. Nothing prevented her from filing a week earlier, but given the information available to her, she had no reason to think that that week would make any difference at all. Timely notice of the *Rosler* tolling principle could have allowed Mrs. Cummings access to judicial review. Indeed, in its decision, the Federal Circuit expressed concern about the "confusion" that the failure to explain the *Rosler* principle causes claimants, and suggested that to "allay such confusion," the Secretary could explain *Rosler* in the initial notice of appellate rights. Moreover, the Secretary has recently added information about the *Rosler* tolling principle to its notice of appellate rights provided with BVA denials. *See* App. 4; *cf.* App. 3. The petitioner maintains that such a notice was always required and that Mrs. Cummings should not suffer from the Secretary's delay in including this crucial information. *Cummings*, 136 F.3d at 1474.

Second, the notice of appellate rights impedes a veteran's access to legal representation. Such representation is a crucial element of judicial review. When it passed the VJRA, Congress eliminated a previous limit on attorneys' fees in the VA system, recognizing that attorney representation of veterans was necessary for effective judicial review. *See* 134 Cong. Rec. S16647 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston) ("[I]f we are going to give veterans real access to judicial review we must give them good, qualified attorneys."); *see also* 134 Cong. Rec. S16650 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston) (attorneys' fees provision will "ensure that those veterans or other claimants who would be able to bring their cases to the new court under the compromise agreement will be able to do so with the assistance of

paid counsel"). The Federal Circuit has acknowledged Congress's intent, stating that Congress intended to encourage petitioners to the Court of Veterans Appeals to seek attorney representation. *Belarmino v. Derwinski*, 931 F.2d 1543, 1544 (Fed.Cir. 1991) (citing 134 Cong. Rec. S16650). Similarly, when it amended the EAJA to apply to cases brought before the Court of Veterans Appeals, Congress expressed concern over the number of cases brought pro se and noted that veterans should not face financial deterrents to defending themselves against unjustified action. *See* H.R. 102-1066, *reprinted in* 1992 U.S.C.C.A.N. 3921, 3934. *See also Cook v. Brown*, 68 F.3d 447, 453 (Fed.Cir. 1995) (discussing legislative history of the EAJA). Indeed, Congress has been so concerned about the high pro se rate before the CVA that it funds a program to secure pro bono publico representation for veterans, a program to which the CVA has expressed its gratitude. *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994).

Congress had good reason for encouraging the participation of attorneys in proceedings before the Court of Veterans Appeals. As the CVA has stated, its proceedings are adversarial in nature. *See Ashley v. Derwinski*, 2 Vet.App. 307, 312 (1992). In these adversarial proceedings, the Secretary is represented by competent, highly trained attorneys. *See* 38 U.S.C. § 7263(a). This adversarial atmosphere represents a dramatic change for the claimant, who benefits during the administrative proceedings from ex parte treatment as well as the VA's assistance in the development of facts pertinent to the claim. 38 C.F.R. § 3.103(a) (1997). It is critical that the claimant be informed of that change from a paternalistic, nonadversarial system to the adversarial judicial system in which

highly trained attorneys will seek every available legal basis to defeat the veteran's claim before the Court.

To construe a statute, a court looks not only to the particular statutory language but also to the design of the statute as a whole, as well as the statute's object and policy and the objects and policies of the overall law on the matter. *Crandon v. United States*, 494 U.S. 152, 157 (1990); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). It is clear from the legislative history of the VJRA and the EAJA, as well as the funding of the pro bono program at the CVA, that Congress is committed to a goal of involving attorneys in proceedings before the Court of Veterans Appeals. If the Federal Circuit's holding below is allowed to stand, Congress's intent to effect attorney representation at the Court of Veterans Appeals will be impeded. Thus § 5104(a) should be construed to require that a notice of appellate rights provided by the Secretary includes, first, the possible availability of pro bono representation of the veteran before the Court of Veterans Appeals, and, second, a description of the claimant's right to payment of the attorney's fees by the Department of Veterans Affairs under the EAJA.

An examination of the notification requirements in Social Security hearings also suggests that the notice of appellate rights provided by the BVA falls short when it fails to advise the claimant of his right to representation before the CVA and fails to advise him that he may be entitled to have his attorney fees paid by the VA. Social Security benefits are remedial benefits and thus similar to veterans' benefits. *See, e.g., Walters v. Nat. Assn. of Radiation Survivors*, 473 U.S. 305, 333 (1985) ("We think that the benefits at stake in VA proceedings, which are not

granted on the basis of need, are more akin to . . . Social Security benefits . . . than they are to . . . welfare payments"). Social Security claimants have a right to counsel at administrative hearings. 42 U.S.C. § 406 (1998); 20 C.F.R. § 404.1700 (1997). Circuit courts have consistently held that "in order for this regulation [conferring a right to counsel] to be effective, there is an obligation on the part of the Secretary to notify the claimant of his or her right to be represented at the hearing before the administrative law judge." *Clark v. Schweiker*, 652 F.2d 399, 403 (5th Cir. 1981). Such notice must also describe the limitations placed on the amount of the attorney's fee. *Id. See also Smith v. Schweiker*, 677 F.3d 826 (11th Cir. 1982); *Thompson v. Sullivan*, 933 F.2d 581 (7th Cir. 1991).

Claimants in administrative Social Security proceedings, then, have the right to be informed that they have the right to counsel and that there is a possibility that they may be entitled to a lawyer even if they think they cannot afford one. If such notice is mandatory in the "non-adversarial and informal" Social Security proceedings [*Smith v. Schweiker, supra*, at 830], such notice should certainly be afforded to veterans seeking benefits in the adversarial atmosphere of a federal court. *Smith v. Schweiker, supra*, at 830.

The Federal Circuit's interpretation of § 5104 is especially incongruous given the fact that this Court has repeatedly held that special consideration is to be accorded veterans of the United States Armed Forces. Most recently, the Court stated that when interpreting statutes, "the rule [is] that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-118 (1994). *See King v. St. Vincent's Hosp.*, 502

U.S. 215, 220-221, n. 9 (1994). *See also Fishgold v. Sullivan Drydock & Repair Corp., et al.*, 328 U.S. 275, 285 (1946) (stating that veterans benefits legislation "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 192 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-585 (1976). Given these principles of statutory interpretation, the "explanation of the procedure for obtaining review of [a] decision" mandated in 38 U.S.C. § 5104(a) should be construed liberally; the narrow interpretation of the Federal Circuit should not be allowed to stand. The broader interpretation should require that the notice include explanations of *Rosler*, notice of the potential availability of pro bono representation and of possible eligibility for EAJA fees.

The petitioner does not ask the Secretary to provide each claimant with a "book[ ] . . . on appellate procedure," as the Federal Circuit has suggested. *Cummings*, 136 F.3d at 1473. Instead, the petitioner simply suggests that 38 U.S.C. § 5104, as well as concern for veterans and their right to judicial review, requires that the Secretary explain thoroughly what a veteran must do to protect his right to judicial review as well as how a veteran may receive effective judicial review. As a member of the Federal Circuit has written,

> [W]e must keep in mind the purpose behind the creation and maintenance of our Veterans system. As aptly stated by Abraham Lincoln and inscribed on the wall of the Department of Veterans[ ] Affairs building, the overriding purpose of the Veterans' laws is "to care for him who shall have borne the battle and for his widow and his orphan." This purpose pervades the

> governing law as well as the legislative history of the VJRA. Therefore, when construing ambiguities in the Act, we should err, if we err at all, on the side of protecting a veteran's right to the judicial review Congress has mandated.

Barrera v. Gober, 122 F.3d 1030, 1040 (Fed. Cir. 1997) (Plager, J., concurring).

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

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Helen CUMMINGS, Claimant-Appellant,

v.

Togo D. WEST, Jr., Acting Secretary of Veterans Affairs, Respondent-Appellee.

No. 97-7004.

United States Court of Appeals,
Federal Circuit.

Feb. 24, 1998.

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Before LOURIE, Circuit Judge, and ARCHER, Senior Circuit Judge,* and CLEVENGER, Circuit Judge.

LOURIE, Circuit Judge.

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* Senior Circuit Judge Glenn L. Archer, Jr. vacated the position of Chief Judge on December 24, 1997.

Helen Cummings appeals from the decision of the United States Court of Veterans Appeals dismissing her appeal for lack of jurisdiction. *See Cummings v. Brown*, No. 95-1058, 1996 WL 366406 (Vet.App. June 26, 1996). Because Cummings did not timely appeal to the Court of Veterans Appeals, we affirm.

BACKGROUND

In 1992, Cummings, the surviving spouse of a deceased veteran, applied to the Department of Veterans Affairs (VA) seeking dependency and indemnity compensation. The VA's Montgomery, Alabama Regional Office denied her claim, finding no service connection between her husband's death and his military service. Cummings contested that decision by filing a Notice of Disagreement to the Board of Veterans' Appeals. *See* 38 U.S.C. § 7105(a) (1994). On February 28, 1995, after the Board dismissed Cummings' claim, the VA mailed copies of the Board's decision to Cummings and to her designated legal representative, the National Appeals Office of the Disabled American Veterans. *See* 38 U.S.C. §§ 5104, 7104(e) (1994). Along with each copy of the decision, the VA sent a form entitled "Board of Veterans' Appeals Notice" ("Appeals Notice"), *see* 38 U.S.C. § 5104(a) ("The notice shall include an explanation of the procedure for obtaining review of the [Board's] decision."), which stated in relevant part:

> If the decision is not favorable to you:
>
> (1) You may file a motion for reconsideration of this BVA decision at the following address: . . . Your motion may be in the form of a letter. It should state clearly and specifically

which issue or issues you want the BVA to reconsider and the specific reasons why the BVA should reconsider the issue or issues.

(2) You may have the right to appeal this decision to the United States Court of Veterans Appeals (the Court). You may appeal to the Court a final decision of the BVA that follows a notice of disagreement filed on or after November 18, 1988. A Notice of Appeal must be filed with the Court within 120 days from the date of mailing of the notice of the BVA decision. The date of mailing is the date that appears on the face of the BVA decision. The Court's address is:. . . . You may obtain information about the form of the Notice of Appeal, the methods by which you may file your Notice of Appeal with the Court, the amount of any filing fee, and other matters covered by the Court's rules directly from the Court. . . .

In addition to these rights, you may also reopen your claim by submitting new and material evidence to the Department of Veterans Affairs (VA) office where your claim originated. VA may not consider another claim on the same factual basis. Reopening your claim will not affect this BVA decision, but your reopened claim may be granted on the basis of new and material evidence which supports your claim.

An accredited representative of a recognized service organization, or an individual whom you choose to represent you in your claim before VA and on appeal to the BVA, may represent you without charge. An attorney-at-law or an accredited agent may also represent you. An attorney or accredited agent may charge you a fee to represent you before VA, including the

> BVA, with respect to a claim under the following circumstances:. . . . You may ask the Court to give you information on representation before the Court.

On July 5, one hundred and twenty-seven days after the Board's decision and the Appeals Notice were mailed, Cummings filed a motion for reconsideration by the Board. *See* 38 C.F.R. § 20.1000 (1996) ("Reconsideration of an appellate decision may be accorded at any time by the Board . . . (a) Upon allegation of obvious error of fact or law; (b) Upon discovery of new and material evidence . . . ; or (c) Upon allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant."). On August 2, the Board denied Cummings' motion on its merits. Then, on October 24, eighty-four days after her reconsideration motion was denied, Cummings filed a notice of appeal to the Court of Veterans Appeals seeking review of the Board's decision denying her claim.

The court dismissed Cummings' appeal for lack of jurisdiction because neither her motion for reconsideration nor her notice of appeal were filed within 120 days of the Board's decision. In response to Cummings' arguments contesting the adequacy of the Appeals Notice, the court concluded that the VA had satisfied section 5104(a) by mailing an Appeals Notice which provided "a general outline of what steps must be taken in order to appeal the BVA decision to this Court." Cummings appeals to this court, again arguing that the Appeals Notice did not meet the requirements of section 5104(a). She reasons that because the Secretary provided her with an inadequate

notice of her appeal rights, the 120-day appeal period was tolled, i.e., suspended. She therefore asserts that her appeal was not untimely.

DISCUSSION

Our jurisdiction to review a decision of the Court of Veterans Appeals is limited by statute; it does not extend to challenges either to factual determinations or to the application of the law to the facts of a particular case. *See* 38 U.S.C. § 7292(d)(2) (1994). However, it does extend to decisions regarding "the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." *Id.* § 7292(a); *see also id.* § 7292(c), (d) (vesting jurisdiction over review of Court of Veterans Appeals decisions in this court and setting certain standards for review); *Fugere v. Derwinski*, 972 F.2d 331, 334 (Fed.Cir.1992). Since this appeal presents a question of statutory interpretation, *viz.*, the requirements of a notice imposed by section 5104(a), it is clear that we have jurisdiction to decide this issue. *See Collette v. Brown*, 82 F.3d 389, 392 (Fed.Cir.1996). We review the legal question of statutory interpretation *de novo*. *See Jones v. Brown*, 41 F.3d 634, 637 (Fed.Cir.1994).

Cummings asserts that the court erred in determining that the Appeals Notice met the requirements of section 5104(a). Relying on this premise, she contends that the court should have considered the 120-day appeal period to have been tolled. She first argues that the notice was inadequate because it did not explain the Court of Veterans Appeals' holding in *Rosler v. Derwinski*, 1

Vet.App. 241 (1991). Specifically, relying on the legislative history of the Veterans' Benefits Amendments of 1989, Pub.L. No. 101-237, 103 Stat. 2062 and the Veterans' Judicial Review Act of 1988, Pub.L. No. 100-687, 102 Stat. 4105, she argues that section 5104(a) requires the Secretary to provide "detailed notice" of the court's holding in *Rosler*. She also notes that the Secretary did provide such detailed notice of the court's holding in *Rosler*, but only after her motion for reconsideration had been denied.

In *Rosler*, the Court of Veterans Appeals correctly held that its jurisdiction extends only to appeals filed within 120 days of a final Board decision. *See Rosler*, 1 Vet.App. at 242; *see also* 38 U.S.C. § 7266(a)(1) (1994 & Supp. II 1996) ("In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to [38 U.S.C. §] 7104(e)."). The court then observed that the finality of a Board decision may be abated by reconsideration, and that there is no deadline for filing a request for reconsideration. *See Rosler*, 1 Vet.App. at 244-45 (citing *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284, 107 S.Ct. 2360, 2368-69, 96 L.Ed.2d 222 (1987)); *see also* 38 U.S.C. § 7103(a) (1994 & Supp. II 1996) ("The decision of the section [of the Board] is final unless the Chairman orders reconsideration of the case."); 37 C.F.R. § 20.1000(b) (1997) ("Reconsideration . . . may be accorded at any time. . . . "). Accordingly, the court concluded that it had jurisdiction over an appeal in which a claimant filed a motion for reconsideration by the BVA

during the 120-day appeal period, if she also filed a notice of appeal to the court within 120 days of the denial of the motion for reconsideration or, if the motion for reconsideration was granted, within 120 days of the reconsidered BVA decision. *See Rosler*, 1 Vet.App. at 249.[1] Thus, stated succinctly, Cummings' first argument is that the Appeals Notice was inadequate because it failed to explain that she could have temporarily preserved the jurisdiction of the Court of Veterans Appeals by filing her motion for reconsideration within the 120-day appeal period.

Cummings also argues, again relying on legislative history, that section 5104(a) requires the Secretary to notify a claimant that she may be represented by an attorney before the Court of Veterans Appeals and that, if the conditions specified in the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994 & Supp. III 1997), are met, she may be entitled to have the VA pay her attorney fees.[2]

In response, the Secretary of Veterans Affairs argues that the Appeals Notice satisfied section 5104(a) by indicating to Cummings the steps necessary to initiate review,

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[1] Because neither party challenges the Court of Veterans Appeals' holding in *Rosler*, we accept, without deciding, that the court had jurisdiction in that case.

[2] As amicus curiae, the National Organization of Veterans Advocates makes the same arguments, but also appears to argue that we should extend the filing period in this case under the doctrine of equitable tolling. We reject this argument. Neither this court nor the Court of Veterans Appeals has the authority to extend the section 7266(a) appeal period. *See Butler v. Derwinski*, 960 F.2d 139, 140-41 (Fed.Cir.1992).

informing her of the sole relevant time limit, and instructing her to contact the court if she had further questions regarding its procedures. The Secretary further contends that neither section 5104(a) nor the relevant legislative history requires him to notify claimants of further details concerning legal representation before the court. We agree with the Secretary that section 5104(a) requires nothing more than the Appeals Notice provides, *viz.*, a general outline of the available procedures for obtaining review of a final Board decision. Accordingly, the 120-day appeal period was not tolled and the Court of Veterans Appeals correctly determined that it lacked jurisdiction to hear Cummings' appeal.

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Interpretation of a statute requires a court to give effect to the intent of Congress as manifested in the express statutory language and structure. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990) ("To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute."). Thus, our duty is "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 338, 1 L.Ed.2d 331 (1957). In discharging that duty, "we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990).

Section 5104(a) provides that "the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of [the Board's] decision. The notice shall include an explanation of the procedure for obtaining review of the decision." A claimant may seek "review"[3] of the Board's decision by means of either a motion for reconsideration by the Board, *see* 38 U.S.C. § 7103(a) (1994); 38 C.F.R. § 20.1000(a) (1997) ("Reconsideration of an appellate decision may be accorded at any time . . . [u]pon allegation of obvious error of fact or law."), or a notice of appeal to the court, *see* 38 U.S.C. § 7252 (1994) ("The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals."). Section 5104 requires the Secretary to explain the procedures for instituting each of these types of review. Contrary to Cummings' argument, the statute does not also require that the Secretary explain how the pursuit of one procedure may or may not affect recourse to the other, nor does it require the Secretary to explain every tactic by which a claimant may preserve

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[3] We contrast "review" of the Board's decision with "reevaluation" of the claim in light of new and material evidence. Reevaluation may be obtained by seeking reconsideration by the Board, *see* 38 C.F.R. § 20.1000(b) ("Reconsideration of an appellate decision may be accorded at any time . . . [u]pon discovery of new and material evidence in the form of relevant records of the service department concerned."), or by submission of the new and material evidence directly to the VA office in which the claim was originally filed, *see* 38 U.S.C. § 5108 (1994) ("If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall open the claim and review the former disposition of the claim.").

recourse to each procedure. Books are written on appellate procedure, and the statute does not require that the notice be a legal treatise. The statute requires only that the Secretary explain how and when to pursue reconsideration by the Board and appeal to the court. The Appeals Notice explains these procedures and clearly identifies the sole relevant filing deadline, the 120-day period for filing an appeal to the court.

Cummings' reliance on legislative history to supplement this statutory mandate is misplaced. While it is true that a proposed Senate bill would have required that the Secretary provide "detailed information" to claimants at each stage of claim adjudication including "a detailed description of the subsequent procedural alternatives through which the claim might be pursued," that bill was never enacted into law. *See* S.Rep. No. 101-126 at 269, 294, 296-97 (1989), reprinted in 1989 U.S.C.C.A.N. 1469, 1700, 1702-03. The provision before us does not require such detail. Rather, the enacted requirements described above are far less demanding of the Secretary than the proposed Senate bill. Because the language of the statute is unambiguous and the legislative history does not clearly express a contrary legislative intent, Cummings' argument must fail. *See Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but '[i]n the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.' " (quoting *United States v. James*, 478 U.S. 597, 606, 106 S.Ct. 3116, 3121, 92 L.Ed.2d 483 (1986))).

We also reject Cummings' argument that section 5104(a) requires the Board to explicitly inform each claimant that she may seek legal representation before the Court of Veterans Appeals or that attorney fees for an appeal may be paid by the VA if the government's position was not "substantially justified." *See* 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. III 1997). As the Secretary points out, this argument is largely grounded on the same inapt legislative history cited by Cummings in support of her first argument. Even if we were to consider the cited legislative history to be relevant, it nowhere requires the Secretary to notify a claimant of her right to be represented by counsel before the court. The final paragraph of the Appeals Notice indicates that "[a]n attorney-at-law or an accredited agent may also represent" the claimant *before the VA or Board*, and specifically notifies the claimant where she may inquire regarding similar legal representation *before the court*. Thus, the Appeals Notice does refer to the issue of representation before the court, even though it is not required by statute. Additionally, the notice sought by Cummings regarding the EAJA's attorney fees provision might be misleading. Because the government's position has been found to have been "substantially justified" under the EAJA even when the government has lost on appeal, such a notice might give a claimant false hope that her attorney fees would be paid by the VA. *See, e.g., Felton v. Brown*, 7 Vet.App. 276 (1994) (holding that the VA's position was substantially justified even though the regulation on which it relied was invalidated as exceeding its statutory authority); *see also Pierce v. Underwood*, 487 U.S. 552, 569, 108 S.Ct. 2541, 2552, 101 L.Ed.2d 490 (1988) ("Conceivably, the Government could

take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose.").

Finally, although we conclude that the Secretary's Appeals Notice satisfies the requirements of section 5104(a), we do recognize that the failure to explain the so-called "tolling principle of *Rosler*" may unnecessarily confuse a claimant who wishes to appeal to the Court of Veterans Appeals, but only after first pursuing reconsideration by the Board. The fact that there is no prescribed time limit for seeking reconsideration might cause a claimant to lose sight of the fact that, under *Rosler*, there is a 120-day period for moving for reconsideration if the claimant wishes to appeal to the court after the Board disposes of the motion for reconsideration. To allay such confusion, the Secretary may wish to cite the *Rosler* case in the Appeals Notice and inform claimants that they must either appeal during the 120-day appeal period or seek reconsideration during that time period and then timely appeal to the court following any reconsideration decision, if they wish to preserve their right to appeal.

CONCLUSION

Because the Secretary's Appeals Notice provided Cummings with an adequate "explanation of the procedure for obtaining review of the [Board's] decision," 38 U.S.C. § 5104(a), the time period for filing an appeal was not tolled by virtue of an insufficient notice of appeal rights. As Cummings did not file either a notice of appeal to the court or a motion for reconsideration by the Board

within 120 days of the mailing of the Board's decision, the Court of Veterans Appeals lacked jurisdiction to consider her appeal. Accordingly, the decision dismissing Cummings' appeal is

AFFIRMED.

(Cite as: 1996 WL 366406 (Vet.App.))

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DECISION WILL APPEAR IN TABLES PUBLISHED PERIODICALLY.

No. 95-1058 Helen CUMMINGS, Appellant,

v.

Jesse BROWN, Secretary of Veterans Affairs, Appellee.

No. 95-1058.

United States Court of Veterans Appeals.

June 26, 1996.

ORDER

FARLEY, Judge.

On October 24, 1995, the appellant filed a Notice of Appeal (NOA) from the August 2, 1995, decision of the Chairman of the Board of Veterans' Appeals (Board or BVA) denying reconsideration of a February 28, 1995, BVA decision. On January 24, 1996, the Secretary moved to dismiss for lack of jurisdiction. On March 13, 1996, the Court granted the appellant's unopposed motion for a stay of proceedings pending the Court's decision in Pittman v. Brown, No. 94-925. the Court issued an opinion in that case on April 8, 1996. *See Pittman v. Brown*, 9 Vet.App. 60 (1996).

Because the appellant was represented before the BVA by the Disabled American Veterans (DAV) and in light of the Court's decision in *Davis v. Brown*, 7 Vet.App. 298 (1994), on April 15, 1996, the Court ordered the Secretary to file (1) a copy of the VA Form 23-22

(Appointment of Veterans Service Organization as Claimant's Representative) and (2) a declaration addressing, inter alia, whether the BVA mailed a copy of its February 28, 1995, decision directly to the appellant's representative in accordance with 38 U.S.C. § 7104(e) and, if not, to provide evidence of receipt. *See Davis, supra; Ashley v. Derwinski*, 2 Vet.App. 307 (1992).

On May 15, 1996, the Secretary filed a copy of the VA Form 21-22 and a declaration from the Assistant Director of Administrative Service of the Board. On the appellant's VA Form 21-22 the appellant designated the DAV with no specific address in block 3, and block 12 contains the words "no restrictions." The declaration reflects: (1) that on February 28, 1995, a copy of the BVA decision was mailed to the DAV at its national appeals office; (2) there is no indication that the decision mailed to the appellant's representative was returned as undeliverable by the U.S. Postal Service; and (3) a second courtesy copy was forwarded via flat mail to the DAV office located at the VA regional office.

On June 10, 1996, the appellant, through counsel, filed an opposition to the Secretary's motion to dismiss. The appellant argues that segments of the BVA's notice of appellate rights accompanying its decision are illegal insofar as they failed to provide notice of (1) the appellant's opportunity to retain an attorney at no cost to herself and (2) the law regarding motions for reconsideration. The appellant further argues that she was provided poor advice by her former representative regarding the filing of a motion for reconsideration.

The ultimate burden of establishing jurisdiction rests with the appellant. *See McNutt v. G.M.A.C.*, 298 U.S. 178 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252 (1992). To be timely filed under Rule 4 of this Court's Rules of Practice and Procedure and precedents construing 38 U.S.C. § 7266(a), an NOA must be filed with the Court within 120 days after the BVA decision is mailed to an appellant. *See Butler v. Derwinski*, 960 F.2d 139 (Fed.Cir.1992). Further, to abate the finality of the BVA's decision, the appellant's motion for reconsideration must be filed with the BVA within 120 days after the BVA's decision is issued. *See Rosler v. Derwinski*, 1 Vet.App. 241 (1991). This Court may not review denials of reconsideration by the BVA Chairman in cases where it does not already have jurisdiction by virtue of a timely appeal from a final Board decision. *Mayer v. Brown*, 37 F.3d 618 (Fed.Cir.1994).

The Court holds that the BVA fulfilled the requirements of 38 U.S.C. § 7104(e) on February 28, 1995, when it mailed a copy of its decision to the national appeals office of the DAV. *Cf. Pittman*, 9 Vet.App. at 62 (by designating "(Anywhere)" as the address for his representative, the appellant authorized the BVA to send a copy of its decision to any office of his representative). In order for the appellant's NOA to have been timely then, the appellant's motion for reconsideration must have been received by the BVA within 120 days after February 28, 1995.

The appellant's motion for reconsideration was received by the BVA 127 days after the Board's decision was issued. It is irrelevant that the appellant's then representative may not have informed her of how to protect her right to judicial review under *Rosler*. *See Shields v.*

Brown, 8 Vet.App. 346, 351 (1995) (Court rejected appellant's argument that she was prevented from filing a timely claim by representations of a local veterans service office). Where an appellant relies, to his or her detriment, on the advice of an entity other than VA, the appellant must look to the representative, not VA, for recovery. *Shields*, 8 Vet.App. at 351; *see also Robinson v. United States Navy*, 342 F.Supp. 381, 383 (E.D.Pa.1972) (if the fault or negligence was that of his representative, the appellant may look to the representative for recovery). With respect to the appellant's argument that the notice of appellate rights was deficient, the Court holds that the BVA satisfied the requirement imposed by 38 U.S.C. § 5104(a) providing a "general outline of what steps must be taken in order to appeal the BVA decision to this Court." *Pittman*, 9 Vet.App. at 65. As neither an NOA nor a motion for reconsideration was filed within the 120-day filing period, the Court is without jurisdiction to adjudicate the instant appeal.

On consideration of the foregoing, it is

ORDERED that the Secretary's motion is granted and this appeal is DISMISSED for lack of jurisdiction.

EXHIBIT 3

BOARD OF VETERANS' APPEALS NOTICE

Feb. 28, 1995

Enclosed is a copy of the decision reached by the Board of Veterans' Appeals (BVA) in your appeal. This is a final decision by the BVA. It is based upon all the evidence of record and the applicable laws and regulations.

If the decision is not favorable to you:

(1) You may file a motion for reconsideration of this BVA decision at the following address: Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Your motion may be in the form of a letter. It should state clearly and specifically which issue or issues you want the BVA to reconsider and the specific reasons why the BVA should reconsider the issue or issues.

(2) You may have the right to appeal this decision to the United States Court of Veterans Appeals (the Court). You may appeal to the Court a final decision of the BVA that follows a notice of disagreement filed on or after November 18, 1988. A Notice of Appeal must be filed with the Court within 120 days from the date of mailing of the notice of the BVA decision. The date of mailing is the date that appears on the face of the BVA decision. The Court's address is: The United States Court of Veterans Appeals, 625 Indiana Avenue, NW., Suite 900, Washington, DC 20004. You may obtain information about the form of the Notice of Appeal, the methods by which you may file your Notice of Appeal with the Court, the amount of any filing fee, and other matters covered by the Court's rules directly from the Court. You should also mail a copy of

the Notice of Appeal to the VA General Counsel (027), 810 Vermont Avenue, NW., Washington, DC 20420. However, the VA General Counsel is not a part of the Court and filing a copy of your Notice of Appeal with the VA General Counsel or any other VA office WILL NOT protect your right of appeal.

In addition to these rights, you may also reopen your claim by submitting new and material evidence to the Department of Veterans Affairs (VA) office where your claim originated. VA may not consider another claim on the same factual basis. Reopening your claim will not affect this BVA decision, but your reopened claim may be granted on the basis of new and material evidence which supports your claim.

An accredited representative of a recognized service organization, or an individual whom you choose to represent you in your claim before VA and on appeal to the BVA, may represent you without charge. An attorney-at-law or an accredited agent may also represent you. An attorney or accredited agent may charge you a fee to represent you before VA, including the BVA, with respect to a claim under the following circumstances: (1) you filed a notice of disagreement with respect to the claim on or after November 18, 1988; (2) a final BVA decision was subsequently issued with respect to that claim; and (3) you retained the attorney or accredited agent to represent you within one year from the date of the final BVA decision on that claim. These requirements do not apply to services of agents or attorneys provided after October 9, 1992, in connection with a proceeding in a case arising out of a loan made, guaranteed, or insured under Chapter 37 of title 38, United States Code. In a Chapter 37 loan

proceeding, an attorney or agent may charge a reasonable fee in writing. A copy of any fee agreement between you and the attorney or accredited agent must be filed at this address: Office of Counsel to the Chairman (01C), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. The BVA may review the fee agreement for reasonableness on its own motion, or you or your attorney or accredited agent may file a motion for the BVA to review the fee agreement for reasonableness at the same address at which the agreement was filed. You may ask the Court to give you information on representation before the Court.

EXHIBIT 4

BOARD OF VETERANS' APPEALS NOTICE

Apr. 10, 1998

We have enclosed a copy of the board of Veterans' Appeals (BVA) decision in your appeal. This is the final decision for all issues either allowed, denied, or dismissed by the BVA in the "Order" section of the decision. A "remand" section may follow the "Order," but a remand is not a final decision. *The advice below only applies to issues that were allowed, denied, or dismissed in the "Order."*

You need do nothing further if you are satisfied with the outcome of your appeal. We will return your file to your local VA office to implement the BVA's decision. If you are not satisfied with the BVA's decision on any or all of the issues allowed, denied, or dismissed, you have three options:

(1) Motion for Reconsideration: You can file a "motion" asking the BVA to reconsider its decision by writing a letter to the BVA showing why you believe that the BVA committed an obvious error of fact or law in its decision in you appeal, or showing that new and material military service records have been discovered that are applicable to your appeal. If the BVA decided more than one issue, be sure to tell us which issues you want reconsidered. Address you letter to: Director, Administrative Service (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420. There is no time limit for filing a motion for reconsideration.

(2) Appeal to the United States Court of Veterans Appeals: If this BVA decision follows a Notice of Disagreement file on or after November 18, 1988, you have the right to appeal it to the United States Court of Veterans Appeals (the Court). A Notice of Appeal must be filed with the Court within 120 days from the date of mailing of the notice of the BVA's decision. The date of mailing is the date that appears on the face of the enclosed BVA decision. The Court's address is: The United States Court of Veterans Appeals, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004. You may obtain information about the form of the Notice of Appeal, the procedure by which you may file you Notice of Appeal with the Court, the filing fee, and other matters covered by the Court's rules directly from the Court. You must also mail a copy of the Notice of Appeal to the VA General Counsel (027), 810 Vermont Avenue, NW, Washington, DC 20420. However, this does not take the place of the Notice of Appeal you must file with the Court. Filing a copy of your Notice of Appeal with the General Counsel, the Board, or any other VA office WILL NOT protect your right of appeal to the Court.

(3) Reopening your claim: While it would not affect this BVA decision, you can also ask you local VA Regional Office to reopen your claim. To be successful in reopening your claim, you must submit new and material evidence to that office. VA may not consider another claim on the same factual basis.

You can do one or any combination of the above three things, but filing a concurrent Notice of Appeal with the court and a motion for reconsideration with the Board may delay your case because of jurisdictional conflicts.

You will still have time to appeal to the Court after you file a motion for reconsideration with the Board if you file you motion promptly. The Court has held that if we receive you motion for reconsideration within 120 days from the date we mailed you the enclosed decision you will still be able to file a Notice of Appeal with the Court within a period of 120 days from the date that the Board mails you either notice that it has denied you motion or notice of its decision on reconsideration. If you file a Notice of Appeal with the Court before you file a motion for reconsideration with the BVA, the BVA will not be able to consider your motion without the Court's permission.

Representation before VA: You may represent yourself in your claim before VA, including the BVA, or you may appoint someone to represent you. You may appoint an accredited representative of an organization recognized by VA (a "service organization"), or another individual whom you choose, to represent you in your claim. These persons may not charge you to represent you. In the alternative, you may appoint an attorney-at-law or a VA accredited agent to represent you. These persons may charge you a fee for their services under the following circumstances: (1) you filed a notice of disagreement with respect to the claim on or after November 18, 1988; (2) a final BVA decision was subsequently issued with respect to that claim; and (3) you retained the attorney or accredited agent to represent you within one year from the date of the final BVA decision on that claim. An attorney or agent can charge a reasonable fee without meeting these requirements of services provided after October 9, 1992, in connection with a proceeding in a case arising out of a

loan made, guaranteed, or insured under Chapter 37 of title 38, United States Code. In all VA cases, a copy of any fee agreement between you and an attorney or accredited agent must be filed at this address: Office of the Chief Counsel (01C), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420. The BVA may review the fee agreement for reasonableness on its own motion, or you or your attorney or accredited agent may file a motion for the BVA to review the fee agreement for reasonableness at the same address at which the agreement was filed.

Representation before the Court: Information about representation before the Court may be obtained by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants.